No. 14906

United States Court of Appeals
For the Ninth Circuit

PUGET SOUND PULP & TIMBER CO., a corporation,
Appellant,

vs.

JOE A. O'REILLY, *Appellee.*

JOE A. O'REILLY, *Cross-Appellant,*

vs.

PUGET SOUND PULP & TIMBER CO., a corporation,
Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE — CROSS-APPELLANT

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Appeal from the United States District Court for the Western District of Washington, Northern Division

Honorable John C. Bowen, *Judge*

BRIEF OF APPELLEE — CROSS-APPELLANT

COUNTER-STATEMENT OF THE CASE

Appellee takes issue with appellant's statement that the Statute of Frauds was pleaded as an affirmative defense (Appellant's Brief page 2). Although the Answer contains seven affirmative defenses, the Statute of Frauds is not among them (Tr. 19-29).

Appellee further takes issue with appellant's assertion that the California Paperboard Co., in which O'Reilly became interested in 1951, would be competing with the paperboard division of appellant, and that his interest therein amounted to breach of his employment agreement. The record is to the contrary (Tr. 118-119). It further appears that the California Paper-

board Co. did not commence production until November, 1951, four months after the conversation which appellant contends resulted in an accord and satisfaction (Tr. 119; Finding XII; Tr. 403).

The remainder of appellant's Statement of the Case is substantially accurate. However, appellee considers the following additional facts of importance and necessary to a consideration of the issues presented by the appeal and cross-appeal:

(a) Exhibit "A" to the complaint (Exhibit 1 in evidence) (Tr. 8), the contract of May 22, 1946, is in writing and signed by appellant and appellee.

(b) Exhibit "B" to the complaint (Exhibit 3 in evidence) (Tr. 15), the contract of June, 1946, is in writing and unsigned. The parties are O'Reilly and *Bellingham Paper Products Co.* (not appellant) and is referred to as the "Agency Agreement" (Tr. 90-91).

(c) Appellant in its Statement of the Case (Tr. 2) states, "This is an action by Joe A. O'Reilly, appellee, to recover additional commissions claimed to be due him under an agency agreement . . . " As the complaint (Tr. 3-8) indicates, appellee pleaded both agreements. Appellee does not purport to rely solely on Exhibit "B."

(d) The Bellingham Paper Products Co., by its Board of Directors (Exhibit 5), adopted the "Agency Agreement" (Exhibit "B" to the complaint) (Exhibit 3) (Tr. 90-91).

(e) When Bellingham Paper Products Co. was dissolved in December, 1947, Exhibit 10, dated Dec. 1, 1947, was signed. This was a contract in writing be-

tween Turcott and Evans as liquidating trustees of Bellingham Paper Products Co. on the one hand, and Puget Sound Pulp & Timber Co. on the other. That agreement provides, in part, as follows:

> "It is understood that the following are accomplished hereby:
>
> "(a) A transfer of all interest of Bellingham Paper Products Co. in and to its Agency Agreement with Joe A. O'Reilly;"

It is stipulated that the "Agency Agreement" therein referred to is Exhibit 3 (Exhibit "B" attached to the complaint) (Tr. 89-91). It will be noted that this Exhibit 10 is signed "by the party to be charged," Puget Sound Pulp & Timber Co.

ARGUMENT

Argument on Appellant's Specification of Error No. 1

Appellant argues under this specification that the court's finding that (Tr. 38) O'Reilly advised appellant that

> " . . . he would temporarily reduce his commission to one and one-half per cent of net sales of the Paperboard Division of defendant corporation, and would *in effect* postpone collection of the remainder thereof." (Emphasis supplied)

is not supported by "an iota of evidence," and extensive excerpts from appellee's testimony are quoted to demonstrate that he did not testify that he was going to "postpone" collection of the balance.

Observe that the trial court did not find that O'Reilly so testified or that any such express language was used by either party to the conversation. The court finds that

O'Reilly would *"in effect"* postpone the collection of the remainder. The function of the Findings is to find ultimate facts, or factual conclusions and not evidentiary matters. The *ultimate* fact is amply supported by the evidence (Tr. 96-97, 109-113, 143-144, 157, 159-160, 213, 217, 225-226, 259-260).

The trial court found the necessary effect of O'Reilly's testimony to be that he would temporarily reduce his commissions and postpone the collection thereof. That it does not purport to be an evidentiary finding is demonstrated by the fact that the reference "until the operation became profitable" (Tr. 97, Ex. A-6), which appellant deems significant in its argument, is completely omitted from the finding. It was omitted not because it wasn't said (Tr. 97), but because it was without legal significance.

The finding is a conclusion of mixed fact and law and is derived from the court's oral decision wherein the court said:

> "There was no valid accord and satisfaction entered into by and between these parties, because the defendant company neither did nor omitted to do any act or thing as to which it was not already obligated to do in consequence of any suggestion on plaintiff's part that he was in effect *postponing* the collection of one and one-half per cent, in other words, one-half of his contracted commissions in this case. Nor did plaintiff thereafter lessen his efforts to perform his part of the agency contract." (Tr. 290)

Appellant further argues that no showing was made that the operation ever became profitable and that the

burden was on appellee to prove it (Brief pp. 17-18). That this is untenable is demonstrated by the fact that:

1. O'Reilly had no interest in the profits or losses of the appellant. No benefit would flow to him by an increase or decrease in profits. His commissions were entirely based on sales (Exs. 1 and 3). Hence there cannot be found in that phase of his remark any consideration for the reduction of his commission.

2. Furthermore, whether or not the Paperboard Division made a profit was a matter largely dependent on what system the appellant corporation used in computing costs. There is no evidence that the division was ever actually unprofitable. The appellant, purely for statistical accounting data purposes, billed slush pulp to the division not at cost, as raw materials to the other divisions were handled, but at average market price (Tr. 261, 264).

> "Q. Mr. Turcotte, when you were in the habit in 1948 of billing to the division of pulp at average market, the fact that that resulted in a loss in that division did not necessarily mean you were losing money from the operation of that division but that it may mean you were making less money than had you sold the pulp directly, is that correct?
>
> A. That is correct, yes. . . .
>
> Q. And it made no difference to the sales volume of that division which accounting system you used?
>
> A. Not a bit.
>
> Q. Now, you have Exhibit 1, do you, in your hand? May I refer you to paragraph (2)? Excuse me. In reference to paragraph (8), the commissions paragraph which you previously read, the profit position under each or either of the account-

ing methods you have just described is unrelated to that, the commission which Mr. O'Reilly would receive?

A. It is unrelated as to the amount of commission he would receive. That is right." (Tr. 263-264)

It will be noted that appellant approaches the profit subject by indirection and nowhere states directly the proposition on which it necessarily rests, *viz.,* the consideration for excusing appellant from the contracted debt is that the Paperboard Division was unprofitable. To state the proposition clearly is to answer it because (1) it is a legal *non sequitur* which could not be supported by any valid argument and (2) it is factually inaccurate, there being no showing that the division was ever unprofitable.

In legal effect O'Reilly might just as well have said, "I will reduce my commission until the Lignisite Division becomes profitable."

During the course of this argument under this specification appellant makes reference to appellee's burden of proof. It will be observed that the plaintiff's complaint alleges facts which at this stage of the case are virtually *all* admitted (except that the June, 1946, contract, pleaded as being signed, is now conceded by both parties to be unsigned). This entire case is tried and appealed on the *appellant's affirmative defenses.* There ought to be no question that the burden of proof was squarely on appellant to prove by a preponderance of the evidence the allegations of its affirmative defenses, including the alleged "contract" modifying the one sued on. It was, therefore, a part of the *appellant's* case to establish that the paperboard division was un-

profitable, if that was a fact, and if it had any materiality, both of which propositions appellee denies.

Finding of Fact number X is supported by the evidence as an ultimate fact. In any event, both the question of "postponement" and the question of whether "the operation became profitable" are without significance in resolving the fundamental question of whether or not the reduction of appellee's commissions were supported by consideration. Since to omit the portion of the Finding to which error is assigned would leave the issue unaffected, appellant's claim of error is directed to a matter which is neither prejudicial nor reversible.

Argument on Appellant's Specification of Error No. 2

Here appellant argues (1) the contract was executory and (2) an executory contract can be modified as to the unexecuted portion without consideration.

A reading of the cases cited in support of appellant's position demonstrates that they fall into two categories:

1. Cases in which the contract is "executory" in the sense that the terms thereof have been agreed upon but no substantial performance has been had by either party. Such is the case in the following cases cited by appellant:

> *Hunters Cattle Co. v. Carstens Packing Co.,* 129 Wash. 377, 225 Pac. 68 (1924);
>
> *Inman v. Roche Fruit Co.,* 162 Wash. 235, 298 Pac. 342 (1931);
>
> *Meyer v. Strom,* 37 Wn.(2d) 818, 226 P.(2d) 218 (1951);

Nielson v. Northern Equity Corp., 147 Wash. Dec. 155, 286 P.(2d) 1034 (1955).

2. Cases in which the contract is "executory" in that the terms have not only been agreed upon but have been partially performed and the parties agree to terminate the future performance on both sides. Such cases hold that the release of the unperformed duties of the one party will support the release of the unperformed duties of the other. Into this factual category fall the following cases cited by appellant:

LaPlante v. Hubbard, 125 Wash. 621, 217 Pac. 20 (1923);

Savage Arms Corp. v. United States, 266 U.S. 217, 69 L.Ed. 253;

Hartsville Oil Mill v. United States, 271 U.S. 43, 70 L.Ed. 822;

Mid State Prods. Co. v. Commodity Credit Corp., 196 F.(2d) 416 (7 Cir., 1952);

Abrams v. Astor, 170 F.(2d) 544 (2 Cir., 1948).

The appellee has no quarrel with the propositions suggested by either group of cases, *viz.*: (1) that where an executory contract is fully executory in that neither party has performed, it may be terminated or modified by a naked agreement to do so, and (2) where it has been partially performed on both sides it may be, by naked agreement either (a) mutually terminated as to the unperformed portion or (b) new and different conditions mutually imposed on each party for the remaining performance.

It will be noted from the cases cited by appellant, *supra,* that, although there may be some dictum that

no consideration is necessary to modify an executory contract, the cases in each instance are those in which there is *in fact* consideration. In the first category the consideration is the mutual release of each party from the obligations imposed on him by the contract. In the second category the consideration is (a) the mutual release of each party from performance of the, as yet, unperformed ("executory") portion or (b) the modifications agreed upon confer some benefit or impose some detriment upon each of the parties which, though perhaps unequal, would constitute a consideration for the modified performance.

Appellant contends that O'Reilly's employment was terminable at will and that the consideration for the reduction was the furnishing of the job. This questionable legal proposition need not be argued since it is wholly unsupported by the facts. Note that Exhibit "A" to the Complaint (Exhibit 1 in evidence), the signed contract between the Puget Sound Pulp & Timber Co. and O'Reilly, provided, *inter alia,* for a 5-year agency agreement with O'Reilly "the agency to run from the beginning of manufacture in said mill" and which, *even in the event of O'Reilly's breach,* could not be terminated by appellant until "two (2) years from the date the mill commences production" (Tr. 11-12). It is stipulated (Tr. 58, (7)) and the court found (Tr. 38, Finding IX) that the mill commenced production in May, 1947 (Tr. 78, 258, Appellant's Brief p. 3). There is no claim of breach by O'Reilly *in the 2-year period.* At the time of the "contract" allegedly modifying the previous contract (December, 1948) only 20 months had expired. It was not terminable at will at

that time, or, indeed, at any time during O'Reilly's tenure of employment. [It will be noted that, although the scrivener of Ex. "B," (Ex. 3 in evidence), in copying, omitted the "5-year agency" clause found in Exhibit "A," he did not omit the 2-year non-cancellation clause (Tr. 16-17).]

Having noted that consideration always inheres in the mutual termination of a contract which is executory in the sense that it has not been performed on either side, or in the sense that it has been partially performed on each side but is either mutually terminated or modified with a change in each party's rights and duties, we now turn to the law of Washington as it pertains to contracts partially performed on both sides where the parties "agree" that all requirements of both parties shall continue and remain in full force and effect during the remaining executory life of the contract *except that one party's benefits will be cut in half* (Tr. 96-97, 109-113, 143-144, 157, 159-160, 213, 217, 225-226, 259-260). What is the law of Washington as to that?

> "The rule is elementary that neither the promise to do nor the actual doing of that which the promisor is by law or subsisting contract bound to do is a sufficient consideration to support a promise in his favor." *Allen v. Farmers & Merchants Bank,* 76 Wash. 51, 135 Pac. 621 (1913); *Keane v. Fidelity Savings & Loan Association,* 173 Wash. 199, 22 P.(2d) 59 (1933).

For cases from other jurisdictions holding that an agreement by a landlord to accept a lesser rent than that specified in the lease even when followed for an extended period by acceptance of the reduced sum and

giving receipts therefor, is void for want of consideration, see 12 Am. Jur. Contracts, Sec. 412, page 990; *Coe v. Hobby,* 72 N.Y. 141, 28 Am. St. Rep. 120; *Durband v. Nicholson,* 205 Iowa 1264, 216 N.W. 278; *Goldsborough v. Gable,* 140 Ill. 269, 29 N.E. 722, 15 L.R.A. 294.

Mosher v. Mosher, 25 Wn.(2d) 778, 172 P.(2d) 259 (1946), was a suit to recover support payments then in arrears. Defendant pleaded that the parties had made an agreement whereby plaintiff agreed to accept in the future, and for a long period of time after the agreement did accept a lesser sum than that called for by the divorce decree. In rejecting this agreement the court said:

> "In the first place, if such an agreement was in fact entered into, it was void for want of consideration, on the theory that an obligation to pay a sum certain cannot be discharged by the payment of a lesser sum."

In *Queen City Construction Co. v. Seattle,* 3 Wn.(2d) 6, 99 P.(2d) 407 (1940), the contractor entered into an agreement with the city engineer for payment for the installation of a subdrain as an extra. In a suit for the extra the city contended that the agreement to pay additional compensation was without consideration. The Court stated:

> "If the respondent was not entitled to additional compensation for the installation of the subdrain, but was required to itself pay for draining the trench, the agreement between the respondent and the city engineer was without consideration and unenforceable. In 17 C.J.S., Contracts, Page 465, Section 112, the rule is stated as follows:

> " 'The promise of a person to carry out a subsisting contract with the promissee, or the performance of such contractual duty is clearly no consideration, as he is doing no more than he was already obliged to do, and hence has sustained no detriment nor has the other party to the contract obtained any benefit. Thus, a promise to pay additional compensation for the performance by a promissee of a contract which the promissee is already under obligation to the promissor to perform is without consideration and this rule has been applied to building and construction contracts.' "

In support of the foregoing the court cited *Lewis v. McReavey,* 7 Wash. 294, 34 Pac. 832 (1893), and *Keane v. Fidelity Savings & Loan Assn.,* 173 Wash. 199, 22 P.(2d) 59 (1933). The latter case restates the well-known rule:

> "A mere promise to do what one is by law or contract obligated to do is not a good consideration for a promise to pay."

To the same effect as the *Queen City Construction Co.* case is *Westland Construction Co. v. Chris Berg, Inc.,* 35 Wn.(2d 824, 215 P.(2d) 683 (1950), wherein the court stated:

> "Since it is found that the plastering work required was contemplated by the original contract, the trial court was correct in finding that there was not a subsequent agreement on August 14, 1946, which renders the original agreement unenforceable. In any event, such a subsequent agreement would be void because without consideration."

For an excellent exposition of the subject see *Harris v. Morgenson,* 31 Wn.(2d) 228, 196 P.(2d) 317 (1948).

There is no evidence which establishes the existence

of a new contract between appellent and appellee under the terms of which the appellee agreed that the appellant should be fully *discharged of its duty to pay the 3% commission.* To the contrary, the evidence clearly establishes, and the court found, that appellant's duty and obligation to pay the 3% was a continuing obligation for the life of the contracts. Further, the evidence does not sustain a position that remittances of commissions made by appellant during the period involved, January, 1949, to March 1, 1952, were intended by appellee to be in modification of, or in full payment of, commissions which appellant was required to pay under the agency agreements involved.

The mere payment by appellant of the 1½% instead of the 3% commissions, and the acceptance thereof by the appellee does not release the appellant of the duty and obligation to pay the full 3% as there is an absence of consideration therefor.

> "Where a debtor pays what, in law, he is bound to pay, and what he admits he owes, such payment by the debtor and its acceptance by the creditor, even if tendered as payment in full of a larger indebtedness cannot operate as an accord and satisfaction of the entire indebtedness, *as there is an absence of consideration therefor." Bellingham Securities Syndicate, Inc., v. Bellingham Coal Mines, Inc.,* 13 Wn.(2d) 370, 125 P.(2d) 668 (1942); *Seattle Investors Syndicate v. West Dependable Stores,* 177 Wash. 125, 30 P.(2d) 956 (1934).

Argument in Answer to Specification of Error No. 3

Appellant here argues that (1) an accord and satisfaction arose out of the discussions between O'Reilly and appellant wherein O'Reilly wanted to terminate his

employment effective December 31, 1952, while Turcotte was suggesting August 31, 1951, and the parties agreed on February 29, 1952 (leap year) and (2) that appellee is estopped from "repudiating his agreement."

This argument does considerable torture to the discussions between O'Reilly and Turcotte. They discussed only the subject of how long appellant would continue receiving checks, whether until August 31, 1951, or December 31, 1952. They agreed on February 29, 1952 (Tr. 98-101, 122-131). The only accord reached was as to a *termination date* of O'Reilly's employment. The court observed the two witnesses to this transaction and from their testimony found that they

> "orally stipulated and agreed that the services of plaintiff should terminate as of February 29, 1952. The court finds that such agreement of July, 1951, was not, nor was it intended by the parties to be, an accord and satisfaction of any of defendant corporation's indebtedness to plaintiff under said contracts Exhibits 'A' and 'B.' Furthermore, the court finds that no consideration was promised to plaintiff or received by plaintiff to support any alleged accord and satisfaction or mutual release either at this time or any previous or later time from the inception of said contracts to and including February 29, 1952; . . . " (Finding XI, Tr. 39-40)

The Court further found (Tr. 41, Finding XIII) that there was no meeting of the minds nor any intent by either of the parties to indulge in an accord and satisfaction of Appellant's obligations under Exhibits "A" and "B" and that appellant failed to sustain the

burden of proof in this regard. There is ample evidence to support both findings (Tr. 98-101, 117, 120, 122-131, 228-238, 281-283, Ex. A-1).

To the extent that there is a conflict in the evidence as to the conversations between O'Reilly and Turcotte, such conflict should be resolved in favor of the appellee. *Bach v. Friden Calculating Machine Co.*, 155 F.(2d) 361 (9 Cir., 1946); *Paramount Pest Control Service v. Brewer,* 177 F.(2d) 564 (9 Cir., 1949); *Grace Bros. v. C.I.R.,* 173 F.(2d) 170 (9 Cir., 1949); Rule 52, Federal Rules of Civil Procedure.

There cannot be an accord and satisfaction unless there was a dispute, and an agreement to settle it.

> "Accord and satisfaction is founded on contract, and a consideration therefor is as necessary as for any other contract. One rule of law with reference to accord and satisfaction, which has been adopted by this court, is that if a claim of indebtedness is liquidated and undisputed, and is due and owing, payment by the debtor and receipt by the creditor of any amount of money less than the whole amount of the indebtedness will not discharge the balance and this is true even though at the time of making the payment, the debtor announced that he intended thereby to pay in full the entire indebtedness. The reason for this rule is that there is no contract and no consideration because the debtor was in law bound to pay in full that which he admits he owes. *Plymouth Rubber Company v. West Coast Rubber Company,* 131 Wash. 662." *Plotkin v. Green,* 36 Wn.(2d) 253, 217 P.(2d) 610 (1950).

The only dispute between O'Reilly and Turcotte was as to a termination date (Tr. 101, 117, 120, 122-124, 228-238, 281, 283, Ex. A-1). The only possible deviation

from that is Turcotte's remark (Tr. 232) in response to questions from his counsel,

> "I finally made him the proposal that there was no question as to his termination date as an employee of Puget to be September 1, 1951, but that we would pay him at the same rate of one and one-half per cent commission from September 1, 1951, to February 29, 1952." (Tr. 232)
>
> "Q. Will you state the substance of what, if anything, Mr. O'Reilly said in response to your proposal? . . .
>
> A. Well, as I remember, Mr. O'Reilly repeatedly stated that he was not fairly treated. After my proposal to him he said something like: 'I guess that is it'; and got up and left." (Tr. 234)

These were hardly words of acceptance of a proposal. But even to the extent they were, they could not settle anything except the dispute then under discussion. That is, they could settle no more than O'Reilly's compensation for the period September 1, 1951, to February 29, 1952, at one and one-half per cent. However, in this regard it will be remembered that O'Reilly's contract with appellant (Exhibit A, Tr. 8) contemplated a "5-year agency agreement." The five years commenced May, 1947, and would not terminate until May of 1952 (Tr. 258). Again comes the question—is there any consideration for O'Reilly's alleged "promise" to accept less than 3% for any period *prior to May, 1952?* It will be noted that *appellant* agreed to a five-year agency (Ex. "A") whether or not *Bellingham Paper Products Co.* did (Ex. "B"). The parties considered they had a five-year contract (Tr. 236).

Appellant, in support of its accord and satisfaction

argument, contends that O'Reilly was not obligated to do any selling after September 1, 1951, and did not. Hence, it is argued, he is relieved from September 1, 1951, of his obligations under the contract. But, the record shows that O'Reilly testified in detail that he performed his regular duties, at all times including the period from September 1, 1951, to and including February 29, 1952 (Tr. 124). The independent witnesses, Emmons and Frankel, likewise so testified by deposition (Tr. 157-170-211). The court accepted this view of the facts and the factual issue was decided in the court below in favor of appellee (Tr. 39-41; Finding XI, XII, XIII and XIV).

Appellant is in the dubious position of contending that the result of the July, 1951, conversations was an agreement by O'Reilly to take 1½% from *January 1, 1949,* to February 29, 1952, in consideration of appellant paying him such rate for the period September, 1951, to February 29, 1952, when, in fact, no testimony or any other portion of the record discloses any such agreement. Furthermore, it is a legally untenable proposition as the case of *Bellingham Securities Syndicate v. Bellingham Coal Mines,* 13 Wn.(2d) 370, 125 P.(2d) 668 (1942) establishes. It should be noted in passing that the *Bellingham* case is cited not only in answer to the argument of appellant on accord and satisfaction but on estoppel and consideration.

In that case the agreement provided that the lessor should receive a royalty of 12½ cents per ton of coal mined by the lessee plus 25% of the net profits of the operation pursuant to a formula for its determination.

For 21 years plaintiff accepted 12½ cents per ton and in addition approximately $283,000 in distribution of profits for about 15 of the 21 years. Plaintiff sued for some $83,000 claiming to be that much underpaid on profit distribution. Defendant claimed an accord and satisfaction and estoppel since plaintiff was furnished periodic statements with each royalty payment and failed over a great many years to make any claim for any amounts in excess of those received. The trial court dismissed the complaint.

In reversing the trial court the Supreme Court of Washington said,

> "To create an accord and satisfaction in law there must be a meeting of minds of the parties on the subject and intention on the part of both to make such an agreement (citing cases) * * * It must be remembered that an accord and satisfaction is founded on contract and consideration therefor is as necessary as for any other contract * * * Where a debtor paid what in law he is bound to pay and what he admits he owes, such payment by the debtor and its acceptance by the creditor, even if tendered as payment in full of a larger indebtedness cannot operate as an accord and satisfaction of the entire indebtedness as there is an absence of consideration therefor. (citing cases)
>
> "The affirmative defense of estoppel was also pleaded by respondent whose counsel insists that, having either actual or constructive knowledge of the facts, appellant induced respondent by its conduct to believe that appellant acquiesced in or ratified the monthly transactions between the parties; that having induced respondent who had a right to rely upon such conduct appellant may not

now alter tis position but is estopped from repudiating the transaction to the prejudice of the repondent * * *

"Respondent may not successfully urge, in support of its affirmative defense of estoppel, that it was misled by appellant's receipt of reports and royalty payments without objection. It should be borne in mind that respondent knew, as well as appellant, what the terms of the lease were; hence, where parties have equal means of knowledge there can be no estoppel in favor of either. *Wilkinson v. Leberman,* 327 Mo. 420, 37 S.W.(2d) 533.

"Respondent has not changed its position in reliance upon any of the alleged representations of appellant. Respondent did not make any expenditures in developing and equipping the mine which it was not obligated to make under the terms of the lease. The only detriment which the respondent will suffer by having to pay the royalty due is that entailed in performance of its obligation under the lease to pay royalty. *The mere failure to pay what one owes is not a change of position which will support an estoppel* * * * "

The claim of estoppel is wholly without merit. The claim of an accord and satisfaction presupposes that there was a full understanding and meeting of the minds that O'Reilly would be paid 1½% for six months for doing nothing in consideration of his waiving his claim for 1½% *for the preceding 32 months.* Nowhere in the record can be found any such agreement. The record repeatedly shows that the parties negotiated with each other on the sole subject of an expiration date. They agreed on February 29, 1952. There was no disputed claim for past-due commissions being presented for settlement.

"(1) An accord is an agreement for the settlement of a claim by some performance other than that which is due, and is governed by the principles of contract, *Graham v. New York Life Ins. Co.,* 182 Wash. 612, 47 P.(2d) 1029 (1935), and cases cited. To create it, there must be a meeting of the minds upon the subject and an intention by both parties to make such an agreement. *Meyer v. Strom,* 37 Wn.(2d) 818, 226 P.(2d) 218 (1951).

"(2) The mere receipt by respondent of an amount less than is claimed, with the knowledge that appellants admit an indebtedness only to the extent of the payment made, does not of itself establish an accord and satisfaction. When a remittance is made, which is less than the amount in dispute, *it must be made plain to the creditor* that the remittance is tendered as full payment of the disputed amount. If it is so accepted, then there is an accord, and the remittance discharges the entire obligation. *Three Rivers Growers' Ass'n. v. Pacific Fruit & Produce Co.,* 159 Wash. 572, 294 Pac. 233 (1930); Restatement, Contracts, Sec. 420, Comment (a) Illustration 5.

"(3) The facts of the instant case do not meet this test. As was said in *Ingram v. Sauset,* 121 Wash. 444, 447, 209 Pac. 699, 34 A.L.R. 1031 (1922):

" 'The fallacy of appellants' position lies in this: first, whatever Sauset's intention, the check was not offered in full satisfaction of the demand, though respondent thought that Sauset intended or hoped it would be so accepted; no conditions accompanied it and there was nothing to indicate that it might not, in the event that the payee declined to accept it as full payment, be applied on account and further negotiations be had as to remainder

of the claim. Second, there is nothing in the record to indicate that respondent accepted the check as full payment'." *Boyd-Conlee Co. v. Gillingham,* 44 Wn.(2d) 152, 266 P.(2d) 339 (1954).

Appellant argues further that performance under the July, 1951, termination agreement precludes raising the question of consideration. We challenge more than the consideration. There is no evidence that any agreement settling appellee's present claim was ever reached.

On the question of estoppel, we point out that there exists in Washington a rule of law first announced in the early cases of *Evans v. Ore. & Wash. R. Co.,* 58 Wash. 429, 108 Pac. 1095, 28 LRA (NS) 455 (1910) and *Conlan v. Spokane Hardware Co.,* 117 Wash. 378, 201 Pac. 26 (1921), that where the obligor is or becomes financially incapable of performance of his obligation, an agreement to accept a lesser sum is binding and enforcible. This is a rule of necessity. Such is the case in *Vigelius v. Vigelius,* 169 Wash. 190, 13 P.(2d) 425 (1932), and *Douglas County Mem. Hosp. Assn. v. Newby,* 45 Wn.(2d) 784, 278 P.(2d) 330 (1954), cited by appellant. There was no showing that appellant was incapable of performing its contractual obligation to appellee, so as to bring appellant within the purview of the cases relied on by appellant.

The estoppel for which appellant contends requires a showing that appellant has somehow changed his position *to his detriment* in reliance on the "modified" agreement. It is only on this basis and only under those special circumstances that the cases cited by appellant hold that the performance of a modified agreement

estops a challenge to its consideration. Such is the holding of *Reynolds v. Travelers Ins. Co.*, 176 Wash. 36, 28 P.(2d) 310 (1934); *Bowman v. Webster,* 44 Wn.(2d) 667, 269 P.(2d) 960 (1954); and *Mall Tool Co. v. Far West Equip. Co.,* 45 Wn.(2d) 158, 273 P.(2d) 652 (1954), cited by appellant.

There has never been any change in position by appellant which could form the basis for any estoppel. *Bellingham Securities Syndicate v. Bellingham Coal Mines, supra.*

Before leaving the subject of accord and satisfaction we note that appellant makes reference in this regard, in its brief, to O'Reilly's

> "* * * concealment of the fact that he claimed the right to additional compensation." (Brief, p. 13)

and further at page 30:

> "It is important to note that appellee himself did not testify that he disclosed to appellant any claim to recover commissions at the original rate, in the negotiations leading to his termination, or at any time prior to writing his letter of June 5, 1953. (Ex. A-6)."

And further to O'Reilly's "secret intentions" (pp. 33-34).

We fail to understand how there can be a "meeting of the minds upon the subject and an intention by both parties to make such an agreement" (*Boyd-Conlee Co. v. Gillingham, supra,* cited by appellant) when the thing being "settled" is "concealed" or "secret" or not "disclosed" by the parties. It must be conceded that, despite the present wish of appellant to the contrary, the subject of appellee's claim for *unpaid* com-

pensation was neither discussed nor compromised by the agreement of July, 1951. The best evidence of this is Turcotte's own admission that O'Reilly's claim for past commissions was not presented or discussed (Tr. 234).

We cannot square with logic appellant's assertion that O'Reilly's claim was "undisclosed" and "secret," with its citation of the following from 12 Am. Jur. 516, Contracts, Sec. 19 (Brief, p. 32):

> "It is said that the meeting of minds which is essential to the formation of a contract is not determined by the secret intentions of the parties, but by their expressed intentions which may be wholly at variance with the former."

There can certainly be no dispute with the law cited. It supports appellee's view that there can be no contract of accord and satisfaction without a meeting of the minds and a specific mutual intention to settle a disputed claim. Both of these elements necessary to effect an accord and satisfaction are lacking in the case at bar. Appellant failed to sustain the burden of proof of such an agreement (Finding XI, XIII and XIV, Tr. 39-41).

Argument on Appellant's Specification of Error No. 4

It is here contended that Ex. B was (1) unsigned, (2) could not be performed within one year and (3) was therefore void under R.C.W. 19.36.010, the Washington Statute of Frauds.

First it will be remembered that, under Specification of Error No. 2, appellant, there contending there was consideration for the alleged "modification agreement" of December, 1948, asserted that the agreement (Ex. "B") was terminable at will.

"The appellant had the privilege of discharging the appellee at any time had it chosen so to do, but instead relied in good faith upon the modification for over three years.

"It must be remembered that the terms of Exhibit 3 do not specify the duration of that agreement. The parties did not incorporate a five-year period in Exhibit 3 as they had stated they would do in Exhibit 1. Paragraph 5 of Exhibit 3 clearly states that that agreement contains all of the terms of the agreement. So we have a contract for personal services without a termination date. Such contracts are terminable at the will of either party." (citing cases) (Appellant's brief, p. 25)

It is now contended that it cannot be performed within a year.

"It is next urged that the contract, not being in writing, violates Rem. Rev. Stat., Sec. 5825 (1) [P.C. Sec. 7745], providing that agreements not to be performed within one year from the making thereof must be in writing, signed by the party to be charged therewith. Under the facts of this case, however, the statute has no application. The contract was not only made for an indefinite length of time, but was terminable at will. Consequently, it could have been performed at any time after its inception, or terminated within the duration of a year at the will of either party. We have held that in such cases the statute does not apply. *Dent Lbr. & Shingle Co. v. Cedarhome Lbr. Co.,* 141 Wash. 593, 252 Pac. 141; *Barash v. Robinson,* 142 Wash. 118, 252 Pac. 680; *Peabody v. Pioneer Sand & Gravel Co.,* 164 Wash. 26, 2 P.(2d) 714; *Von Herberg v. Von Herberg,* 6 Wn.(2d) 100, 106 P.(2d) 737; *Sargent v. Drew-English, Inc.,* 12 Wn.(2d) 320, 121 P.(2d) 373 (1942).

See also *Davis v. Alexander,* 25 Wn.(2d) 458, 737." *Sargent v. Drew-English, Inc.,* 12 Wn.(2d) Wn.(2d) 710, 237 P.(2d) 1026 (1951).

In any event the Statute of Frauds cannot be employed to challenge the validity of an agreement which has been fully performed. *Maze v. Feuchtwanger,* 106 W. 327, 179 Pac. 850 (1919).

The issue is further foreclosed by appellant's failure to plead the Statute of Frauds as a defense. It must be pleaded. *Moses Land Scrip & Realty Co. v. Stack-Gibbs Lbr. Co.,* 56 Wash. 529, 106 Pac. 207 (1910); *Seattle Taxicab & Transfer Co. v. Kinney,* 74 Wash. 179, 132 Pac. 1013 (1913); *First Natl. Bank v. Gerke,* 85 Wash. 477, 148 Pac. 593, Am. Cas. 1917 B 564 (1915); *Miller v. O'Brien,* 17 Wn.(2d) 753, 137 P.(2d) 525 (1943).

A general denial to a plea of contract will raise the issue. *Goodrich v. Rogers,* 75 Wash. 212, 134 Pac. 947 (1913); *Marshall v. Hillman Inv. Co.,* 151 Wash. 529, 226 Pac. 564 (1929). This, because a general denial denies *the existence of a contract.* But here, appellant not only in the pleadings (Tr. 19, 20) and at the trial (Tr. 71-74, 91) but in this court by stipulation (Tr. 58) admits that Ex. B represents the precise contract between the parties, but simply denies the signatures. The contention in the pleadings and at the trial that it was unsigned was in support of the 7th affirmative defenses of the Statute of Limitations applicable to oral contracts (Tr. 27).

Thus, there is no denial of a contract but an admission there is one. The denial of signatures does not constitute a plea of the statute which is a plea that there is no contract. The denial of signatures enabled appellant

to plead the Statute of Limitations and could serve no other purpose.

As pointed out in appellant's brief, the Washington Statute of Frauds, R.C.W. 19.36.010, does not require that the *contract* be in writing and signed to satisfy the Statute. It merely requires that "some note or memorandum thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." Is there a memorandum of appellant's promise to pay appellee 3% signed by appellant?

At the outset it will be remembered that appellant's promise is also contained in Exhibit "A," signed by appellant and appellee, and formally adopted, ratified and confirmed in *haec verba,* by appellant's Board of Directors(Exhibit 9, Tr. 89). Pursuant to sub-paragraph (8) of Exhibit "A" appellant agreed with appellee to form Bellingham Paper Products Co., which, when organized, would enter into a five-year Agency Agreement with O'Reilly to pay him 3% of net sales (Tr. 11-12).

Pursuant to sub-paragraph (8) of Exhibit "A," appellant did organize the subsidiary, did enter into a contract with appellee to pay him 3% of net sales, and the subsidiary did, in fact, pay the 3% during its corporate existence. As heretofore indicated there is no dispute that Exhibit "B" is the contract between appellee and Bellingham Paper Products Co. Observe here that we are not concerned with whether Bellingham Paper Products Co. signed Exhibit "B," since that company is not the party sought to be charged. Appellant's argument is misleading on this point. What is important

is that after the preparation of Exhibit "B," the following transpired: Bellingham Paper Products Co., by its Board of Directors, adopted, ratified and confirmed the Agency Agreement (Exhibit 5, Tr. 76). We now take it to be the contention of the appellant that these minutes are unsigned (Appellant's Brief 41), although no reference is made by appellant to any portion of the record so indicating. It will be recalled that these are photostatic extracts prepared by appellant and admitted by stipulation (Tr. 33). However, in view of what transpired afterwards, it makes little difference whether either Exhibit "B" or the minutes were signed by Bellingham Paper Products Co.

When Bellingham Paper Products Co. was liquidated the *appellant,* in writing, and over the signatures of its officers (Ex. 10), agreed with the liquidating trustees of Bellingham Paper Products Co. to "a transfer of all interest of Bellingham Paper Products Co. in and to its Agency Agreement with Joe A. O'Reilly," and further provided "Puget Sound Pulp and Timber Co. further assumes and agrees to pay and discharge all liabilities of Bellingham Paper Products Co." (Exhibit 10; Tr. 89-91). At the time of its admission in evidence, counsel stipulated that Exhibit 10, when referring to the "Agency Agreement," referred to Exhibit "B" (Tr. 90). When it is recalled that Exhibit "A" is in writing, signed by appellant; that Exhibit "B" is a specific contract in writing, and is adopted and assumed by appellant by a signed contract, and that there is no dispute or quarrel as to the terms of the Agency Agreement, the requirement of the Statute of Frauds that "some note or memorandum thereof is in writing

and is signed by the party to be charged therewith" is clearly met.

CONCLUSION

Without re-stating all of appellee's answers in detail to the arguments of appellant, the following pertinent events occurred in the relationship between appellant and appellee:

In May, 1946, by Exhibit "A," the parties agreed that a partially owned subsidiary of appellant would be organized, which subsidiary would enter into a five-year Agency Agreement with appellee pursuant to which he could be paid three per cent of the net sales of the subsidiary, the five-year period to commence with production in the mill, which later developed to be May, 1947.

After the organization of the subsidiary, appellee was in fact employed by the subsidiary and paid the three per cent of net sales during the corporate existence of the subsidiary. This was pursuant to a written Agency Agreement, Exhibit "B" and the original contract between the parties, Exhibit "A."

Appellee, prior to any of the events hereinafter noted, was a man of broad experience and qualification in the paperboard and carton business, earning a substantial income in the neighborhood of $40,000.00 a year (Tr. 147). The contracts and agreements are not typical employment agreements in that O'Reilly conceived the entire idea of appellant's going into production of paperboard, and, in addition thereto, substantially contributed to the risk capital of the venture by both cash and equipment. He was the sole person qualified to work out the initial problems of the establishment of the mill,

the establishment of grades, the determination of the needs of possible future customers, the construction of the plant, the purchase of the very large and complicated machinery, and the supervision of its installation (Tr. 65-94, 153-159). The suggestion in appellant's brief that appellee is a mere salesman whose commissions were dependent on sales made *by him,* is false. Appellee was, in all respects, an executive whose compensation was geared to net sales. Here the similarity between his function and that of a salesman ends.

Exhibit "A" was adopted by the Board of Directors of appellant, Exhibit "B" was adopted by the Board of Directors of the subsidiary.

When it became expedient, in December, 1947, to liquidate the subsidiary, appellant purchased appellee's stock, and, in accordance with standard procedure for the liquidation of corporations, the liquidating stockholder, to-wit, appellant, agreed in writing in a document signed by appellant, to take over the contract with O'Reilly, Exhibit "B," and assume all the liabilities and obligations of its subsidiary, including the one just referred to. It will be remembered that at this juncture (December, 1947) and for more than a year thereafter, appellant paid appellee the three per cent commission stipulated in both Exhibits "A" and "B."

Commencing in January, 1949, and each month for the balance of appellee's employment with appellant, down to and including February 29, 1952, appellee was paid one and one-half per cent of net sales instead of the three per cent provided in the contracts referred to (Tr. 94-95). It is without dispute in the testimony that

the obligations, duties and actual conduct of O'Reilly, after January 1, 1949, was identical, in every respect, with his obligations, duties and conduct prior to that time. It is further without dispute in the testimony that the obligations, duties and performance of the appellant were identical in every respect subsequent to January 1, 1949, to that prior thereto, *with the sole exception of the amount of compensation paid appellee by appellant* (Tr. 97, 159-160, 225-226, 259). This presents the classic case of an "agreement" by appellee to carry out a subsisting contract with appellant for which appellant "agrees" to pay him ½ of what it is already bound to pay which the courts uniformly hold to be without consideration and void.

The claim of appellant that the subsisting contracts of appellee with appellant were "modified" was a matter raised as an affirmative defense by the appellant, and upon which the court found a complete failure of proof, which finding was amply supported by the evidence.

In July, 1951, appellant opened the subject of a mutual termination date for appellee's employment. Appellant, through Turcotte, proposed a termination date of September 1, 1951. Appellee, on the other hand, proposed a termination date of December 31, 1952. After exchange of correspondence, and conversation, the parties agreed on February 29, 1952 as a termination date. There is no question but that the parties mutually terminated the agreement as of that date.

Appellant, however, seeks by affirmative defense, to contend that the parties in fact agreed that in consid-

eration of appellee receiving one and one-half per cent of net sales from September 1, 1951, through February 29, 1952, appellee surrendered all claim for the remaining one and one-half per cent unpaid from January 1, 1949, to September 1, 1951. As clearly appears from the record, no such agreement was discussed, and the court found that there was neither a meeting of the minds on the subject of O'Reilly's past-due commissions, nor was there any intent to settle any dispute between the parties other than the effective date of his termination with appellant.

From the entire record it is abundantly clear that the trial court, which had the witnesses before it, and being in a position to weigh the conflicts in the evidence presented by the respective parties, found that appellee's version of the foregoing events, covering a period of some six years, was correct.

We respectfully submit that, with the exception of the interest question hereinafter presented, the Findings and Judgment of the trial court are amply supported by the evidence, and should be affirmed.

BRIEF ON CROSS-APPEAL

No additional statement of the case is necessary to present the issue raised by the Cross Appeal.

QUESTION INVOLVED

Where there was never any dispute as to the amount of net sales but the only dispute is as to the percentage thereof payable to appellee by appellant, the appellee contending that he is entitled to 3% thereof and ap-

pellant contending that percentage to be $1\frac{1}{2}\%$ and it being undisputed that appellant's indebtedness to appellee, exclusive of interest, was either $59,572.04 in accordance with Ex. C attached to the Findings (Tr. 43-45) (Exhs. 6, 11 and A-8 in evidence) or it was nothing, should the judgment for appellee have included interest at 6% on each monthly amount from the respective dates they accrued?

The trial court said "No."

SPECIFICATION OF ERROR

The trial court's striking, on its own motion, the following language from Cross Appellant's proposed Conclusions of Law (Tr. 43) and equivalent language in the Judgment (Tr. 46), to-wit:

> " * * * together with interest at 6% per annum until paid on each unpaid monthly amount which became due him as the same accrued in accordance with Exhibit "C" attached hereto, commencing with the 1st day of February, 1949, and on each installment thereafter up to and including the installment due plaintiff for the month of February, 1952 * * * "

is clearly erroneous.

ARGUMENT

There was no dispute at any time that Exhibits 6 and 11 are the originals of the statements that Bellingham Paper Products Co. and appellant prepared each month and furnished to appellee each month with his check. O'Reilly never disputed the net sales figure either at the trial, here or elsewhere. In fact, appellant prepared a summary of all monies paid appellee which

went into evidence by Stipulation (Tr. 32) containing the same figures.

There can be no question that the claim of appellee was a liquidated claim.

The law of Washington is very liberal in allowing interest not only on liquidated claims but on unliquidated claims when the amount thereof is capable of ascertainment by computation. *Parks v. Elmore,* 59 Wash. 584, 110 Pac. 381 (1910); *Dornberg v. Black Carbon Coal Co.,* 93 Wash. 682, 161 Pac. 845 (1916); *Lloyd v. American Can Co.,* 128 Wash. 298, 222 Pac. 876 (1924); *Barbo v. Norris,* 138 Wash. 627, 245 Pac. 414 (1926); *Woodbridge v. Johnson,* 187 Wash. 191, 59 P.(2d) 1135 (1936); *Hill v. Brandes,* 1 Wn.(2d) 196, 95 P.(2d) 382 (1939); *Ryan v. Plath,* 20 Wn.(2d) 663, 148 P.(2d) 946 (1944); *U.S. v. Skinner & Eddy Corp.,* 28 F.(2d) 373, modified 35 F.(2d) 889, certiorari dismissed 281 U.S. 770, 50 S.Ct. 248, 74 L.Ed. 1176 (1930-9 Cir.).

When payments become due in installments, the obligor becomes liable for 6 per cent interest on each installment from its due date. *Benner v. Billings,* 107 Wash. 1, 181 Pac. 19 (1919).

The foregoing law applies to employment contracts. *Herman v. Golden Arrow Dairy,* 191 Wash. 582, 71 P.(2d) 581 (1937); *Woodbridge v. Johnson, supra.*

The Washington court has held that it was reversible error to disallow interest on deferred payments. *Berol v. Berol,* 37 Wn.(2d) 280, 223 P.(2d) 1055 (1950).

This court has long recognized the substantive law

of Washington on the allowance of interest. *U. S. v. Skinner & Eddy Corp., supra; Hansen & Rowland v. C. F. Lytle Co.,* 167 F.(2d) 170, rehearing denied 167 F.(2d) 998 (1948).

In *Malcolm v. Yakima County Consolidated School District No. 90,* 23 Wn.(2d) 80, 159 P.(2d) 394 (1945), the court held invalid a provision in a teacher's contract requiring the teacher to pay $40.00 a month rent for living quarters. There, as here, there was no dispute as to the monthly amount, only the question of liability was in dispute. The court held interest was recoverable on each monthly payment as it accrued. The court said:

> " * * * The cause of action rests upon the written contracts, it follows that interest is recoverable upon the unpaid balances from the time they were due. See *Rhodes v. Tacoma,* 97 Wash. 341, 166 Pac. 647."

The subject of interest was never discussed or presented until Findings were presented, at which time no exceptions to the proposed language in the Findings and Judgment were taken. The court, on its own motion, after hearing other objections to the form of Findings and Judgment, simply announced the court was striking the provision for interest. We respectfully submit that the court's deletion of the interest award from the Conclusions of Law and Judgment is clearly erroneous and that the Conclusions and Judgment should be amended to restore the deleted language.

The judgment of the trial court should be affirmed on appellant's appeal and modified on appellee's cross-appeal to award interest in accordance with the foregoing.

Respectfully submitted,

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